

Rel: March 13, 2020

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180795

**Fannie M. Pollard, as personal representative of the Estate
of Ed Young, deceased**

v.

H.C. Partnership d/b/a Hill Crest Behavioral Health Services

**Appeal from Jefferson Circuit Court
(CV-17-901873)**

BOLIN, Justice.

The estate of Ed Young, deceased, by and through its personal representative, Fannie M. Pollard, appeals from a summary judgment entered in favor of H.C. Partnership d/b/a

1180795

Hill Crest Behavioral Health Services ("Hill Crest") in a wrongful-death action alleging medical malpractice. We reverse the judgment of the trial court and remand the case.

Facts and Procedural History

On May 7, 2017, the estate of Ed Young sued Hill Crest alleging that Hill Crest caused Young's death on May 9, 2015, by improperly administering the antipsychotic drugs Haldol and Thorazine to Young as a chemical restraint without taking a proper medical history and evaluating him. The style of the complaint indicated that it was filed by the "Estate of Ed Young and Fannie M. Pollard as personal representative of the Estate of Ed Young." On May 8, 2017, the probate court appointed Fannie M. Pollard as administrator of Young's estate. On May 9, 2017, the two-year limitations period under Alabama's wrongful-death act expired. See § 6-5-410(d), Ala. Code 1975.

On June 15, 2017, the estate filed an amended complaint, adding additional claims against Hill Crest. The amended complaint listed as plaintiffs the estate and Pollard as the personal representative of the estate. The parties then engaged in discovery.

1180795

On January 3, 2019, Hill Crest filed a summary-judgment motion arguing that Pollard was not the personal representative of Young's estate when the complaint was filed on May 7, 2017, and that, therefore, she lacked the capacity to bring suit. It further argued that the relation-back doctrine did not apply because the May 7, 2017, complaint was a nullity and there was no properly filed underlying action to which Pollard's subsequent appointment as personal representative could relate.

Pollard responded that she had been properly appointed before the limitations period expired. She argued that Hill Crest's argument was based solely on "relation back" under Rule 15(c), Ala. R. Civ. P., when, instead, Rule 17(a), Ala. R. Civ. P., regarding the "real party in interest," applied.

On March 14, 2019, the trial court held a hearing on the motion. On May 31, 2019, the trial court entered a summary judgment in favor of Hill Crest. The trial court's order provided, in part:

"On May 7, 2015, Ed Young was transported from the VA Hospital to Hill Crest Hospital, being admitted into the Adult Unit. Later, he was transferred to the Psychiatric Intensive Care Unit. On May 8, 2015, it was noted that the patient was

unresponsive and taken to Trinity Medical Center. He died a natural death on May 9, 2015.

"Some two years later, on May 7, 2017, Fannie Mae Pollard, the mother-in-law of the decedent's brother, initiated this action bringing allegations under the Alabama Medical Liability Act against Hill Crest. On May 8, 2017, she applied for and was granted Letters of Administration by the Probate Court of Jefferson County. The Defendant Hill Crest filed its answer on June 15, 2017.

"At issue in this case is whether this cause of action is a nullity due to the fact that it was filed before Letters of Administration were issued to Ms. Pollard. On the one hand, the Defendant contends that summary judgment should be granted because this matter is a nullity; and, on the other hand, the Plaintiff contends, inter alia, that Pollard was the properly appointed administrator because Letters of Administration were issued before the expiration of the statute of limitations.

". . . .

"It is clear that Pollard became the personal representative of the Estate of Ed Young when Letters of Administration were issued by the Probate Court on May 8, 2017. It is equally clear that this action was commenced before Pollard garnered the aforementioned letters. Alabama Code [1975,] § 6-5-410[,] states, in pertinent part:

"(a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama where provided for in subsection (e), and not elsewhere, for the wrongful act, omission, or negligence of any person, or corporation, his or her or their servants or agents, whereby the death of

the testator or intestate was caused, provided the testator or intestate could have commenced an action for the wrongful act, omission, or negligence if it had not caused death.'

"The Alabama Supreme Court in Waters v. Hipp, 600 So. 2d 981, 982 (Ala. 1992), explained that a wrongful death action is statutory and '[one] who sues under this section without having been appointed executor or administrator does not qualify under this section as its personal representative, and the suit is a nullity.' Citing Downtown Nursing Homes, Inc. v. Pool, 375 So. 2d 465 (Ala. 1979), cert denied, 445 U.S. 930, 100 S.Ct. 1318, 63 L.Ed.2d 763 (1980).

"The Alabama Supreme Court has consistently held that only the appointed administrator or executor of a decedent's estate can maintain a wrongful death action and if there is no administrator or executor appointed at the time an action is filed, such action is a legal nullity. See Watson v. University of Alabama Health Services Foundation, 263 So. 3d 1030 (Ala. 2018), Ex parte Hubbard Properties, Inc., 205 So. 3d 1211 (Ala. 2016), Northstar Anesthesia v. Noble, 215 So. 3d 1044 (Ala. 2016), BioMedical Applications of Alabama, Inc., 16 So. 3d 420 (Ala. 2016).

"Letters of Administration as well as Waivers of Heirs, and other forms such as the renunciation of the County Administrator and the Bond were drafted on the Plaintiff's behalf on May 2, 3, and 4; however, those documents were not filed until May 8, 2017, after the Complaint had been filed.

"The Plaintiff contends that the amendment filed on June 15, 2017, relates back to the original complaint filed on May 7, 2017. The Plaintiff further contends that because Ms. Pollard was issued Letters of Administration before the statute

expired, ... the Defendant['s] Motion for Summary Judgment should be defeated. To support her claim, the Plaintiff heavily relies on Ellis v. Hilburn, 688 So. 2d 236 (Ala. 1997), which held that an amendment to a complaint attempting to name a proper personal representative 'related back' to the filing of the original complaint because the acts of the prior improperly appointed personal representative was not void, but merely voidable.

"However, the Court finds that any purported amendment to substitute the personal representative as the proper plaintiff must fail, because a person who is not properly appointed as personal representative cannot bring a wrongful death lawsuit. See Wood v. Wyman, 47 So. 3d 1212, 1218-19 (Ala. 2012); Downtown Nursing Home, Inc. v. Poole, 375 So. 2d 465, 466 (Ala. 1979); Brown v. Mounger, 541 So. 2d 463, 464 (Ala. 1989). Thus, the Complaint filed on May 7, 2017, was of no legal effect. Even though Ms. Pollard filed for Letters of Administration on May 8, 2017, there was no proper underlying action to which Ms. Pollard's appointment as the personal representative could relate back. As the original complaint filed is a legal nullity, there was no viable suit to which any subsequent activity, including amendments, could relate back. The better practice would have been for the Plaintiff to refile the Complaint before May 9, 2017, after she had been appointed the personal representative but before the statute of limitations expired.

"The two-year time period in which to file a wrongful death action found within Alabama Code [1975,] § 6-5-410[,] is a statute of creation rather than a statute of limitations, meaning the two year limitation is an integral part of the substantive cause of action. Pollard took no affirmative measures to refile the Complaint prior to the statute of limitations expiring after she had been appointed the personal representative.

1180795

"Based on the foregoing, it is therefore ORDERED, ADJUDGED, and DECREED that there being no genuine issue of material fact, the Defendant[] [is] entitled to judgment as a matter of law. Therefore, the Defendant['s] Motion for Summary Judgment is hereby GRANTED. Any and all claims asserted by the Plaintiff against the Defendant[s] are hereby DISMISSED, with prejudice."

(Capitalization in original.) Pollard timely appealed.

Standard of Review

"This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038 (Ala. 2004).

Arguments

Pollard notes that she was duly appointed as a personal representative of Ed Young's estate before the statute of limitations expired. She argues that Rule 17(a), Ala. R. Civ. P., and caselaw support her argument that a personal representative appointed before the limitations period lapses has the power to ratify the original lawsuit, which Pollard did when she filed the amended complaint weeks later. She

1180795

further argues that the trial court erred because it failed to make a distinction between the fact that she was appointed administrator before the limitations period expired, whereas all the cases relied on by the trial court involved an appointment of a personal representative after the limitations period had run and did not rely on Rule 17(a).

Hill Crest argues that Alabama's wrongful-death act requires that a personal representative commence a wrongful-death action and that the action be commenced within the two-year limitations period. See § 6-5-410(d), Ala. Code 1975. Hill Crest argues that the amended complaint did not relate back to the original complaint because (1) the relation-back doctrine does not apply to the wrongful-death statute, which is a statute of creation that is not subject to tolling provisions; (2) a personal representative has the authority to "relate back" only acts that are beneficial to the estate, and damages from a wrongful-death action do not pass through the decedent's estate; and (3) the original complaint was a nullity.

Discussion

1180795

A wrongful-death action brought pursuant to § 6-5-410, Ala. Code 1975, a cause of action unknown at common law, is purely statutory. Downtown Nursing Home, Inc. v. Pool, 375 So. 2d 465 (Ala. 1979). Our wrongful-death act provides that a "personal representative" must bring the action within two years of the decedent's death. § 6-5-410(a) and (d).

"The words 'personal representative' are broader in some respects, but when used in this statute, they can only mean the executor or administrator of the injured testator or intestate.

"This statute authorizes suit to be brought by the personal representative for a definite legislative purpose -- to prevent homicide. In prosecuting such actions, the personal representative does not act strictly in his capacity as administrator of the estate of his decedent, because he is not proceeding to reduce to possession the estate of his decedent, but rather he is asserting a right arising after his death, and because the damages recovered are not subject to the payment of the debts or liabilities of the decedent. He acts rather as an agent of legislative appointment for the effectuation of the legislative policy.... And the right is vested in the personal representative alone. No one else, under any circumstances except in the case of the death of a minor child, where [§ 6-5-39, Ala. Code 1975,] gives a preferred right to the father or mother, can maintain the action in any forum. Holt v. Stollenwerck, 174 Ala. 213, 56 So. 912 [(1911)]. 'The only right or duty the administrator has is to maintain the suit, and collect the damages and pay them over to the distributees. He is a mere agency and conduit, provided by the statute for bringing the suit, collecting the damages, and passing them

1180795

over to those entitled thereto.' Kennedy v. Davis,
171 Ala. 609, 55 So. 104 [(1911)]."

Hatas v. Partin, 278 Ala. 65, 67-68, 175 So. 2d 759, 761
(1965).

Our wrongful-death act requires that suit be filed within two years of the decedent's death. § 6-5-410(d). This Court has held: "This two year period is part of the substantive cause of action and is not to be treated as a statute of limitations." Pool, 375 So. 2d at 466. Because the wrongful-death act is a "statute of creation," Ogle v. Gordon, 706 So. 2d 707, 708 (Ala. 1997), the limitations period in the act is not a statute of limitations. "'The statute requires suit brought within two years after death. This is not a statute of limitations, but of the essence of the cause of action, to be disclosed by averment and proof.'" Wood v. Wayman, 47 So. 3d 1212, 1218 (Ala. 2010) (quoting Parker v. Fies & Sons, 243 Ala. 348, 350, 10 So. 2d 13, 15 (1942) (overruled on other grounds by King v. National Spa & Pool Inst., Inc., 607 So. 2d 1241 (Ala. 1992))). "Because the two-year period is not a statute of limitations but a period after which liability under the statute ceases to exist, it is not subject to tolling" Wood, 47 So. 3d at 1218.

1180795

Hill Crest's argument that the relation-back doctrine does not apply to the wrongful-death act because the act is a statute of creation not subject to tolling is unavailing. This is so because the relation-back doctrine does not "toll" a statute of limitations. Instead, the relation-back doctrine "simply recognizes and clarifies what has already occurred" in that application of the doctrine does not extend the limitations period but merely allows substitution of a party in a suit otherwise timely filed. Alvarado v. Kidd, 205 So. 3d 1188, 1203 n. 10 (Ala. 2016). In Ex parte Tyson Foods, Inc., 146 So. 3d 1041, 1045 n. 5 (Ala. 2013), this Court explained:

"The Tyson petitioners also argue that the wrongful-death statute contains its own limitations period and thus is a 'statute of creation' not subject to tolling. See § 6-5-410(d), Ala. Code 1975; Cofer v. Ensor, 473 So. 2d 984, 991 (Ala. 1985). This fact, however, does not affect the capacity analysis. Rule 17(a) does not toll the statute of limitations. '[A]pplication of relation back does not extend the limitation period' but merely allows substitution of a party in a suit otherwise timely filed."

This Court has held that a person cannot file a wrongful-death action, allow the two-year limitations period to expire, and then be appointed as a personal representative for the

1180795

decedent's estate and have that appointment relate back to the filing of the action. See, e.g., Alvarado v. Kidd, 205 So. 3d 1188 (Ala. 2016) (holding that, in a medical-malpractice wrongful-death action, the relation-back doctrine did not permit the patient's husband to relate his appointment as personal representative, which occurred after the two-year limitations period had expired, back to his filing of a petition for letters of administration, which occurred before the limitations period expired); Wood v. Wayman, 47 So. 3d 1212 (the appointment of a deceased patient's widow as the personal representative of his estate, which happened after the limitations period on a medical-malpractice wrongful-death action had expired, was held not to relate back to the filing of the action); Holyfield v. Moates, 565 So. 2d 186, 187 (Ala. 1990) ("[I]f the two-year period prescribed by the statute has expired before the representative is 'duly appointed,' the heirs of the decedent are barred from recovery."); Brown v. Mounger, 541 So. 2d 463, 464 (Ala. 1989) ("Because the Moungers did not receive letters of administration within two years of Nathan's death, they are prohibited from bringing a wrongful death action against Brown.").

1180795

This Court has made a few exceptions to this holding. In Ogle v. Gordon, 706 So. 2d 707 (Ala. 1997), Ogle petitioned the probate court for letters of administration approximately four months after his wife's death. Ogle filed a wrongful-death action on the same day he filed the petition for letters of administration. The probate court, for unexplained reasons, did not appoint Ogle as personal representative until 27 1/2 months after the petition was filed, which was about 8 months after the two-year limitations period expired. The trial court concluded that Ogle's action was time-barred. This Court held that Ogle's appointment as personal representative "related back" to the date on which he filed his petition because the probate court has no discretion in issuing letters of administration when there is no question relating to the qualification of the person requesting the letters. "The doctrine of relation back with respect to the powers of a personal representative has been in existence for approximately 500 years" and was codified by the legislature in § 43-2-831, Ala. Code 1975. 706 So. 2d at 709. The Court held that the probate court's inadvertence did not bar Ogle's wrongful-death action.

1180795

In Holyfield v. Moates, supra, this Court held that an amended complaint, filed after the expiration of the two-year limitations period, related back to the filing of the original complaint to substitute the properly appointed personal representative. The granddaughter of the decedent, purportedly as the personal representative of the decedent, filed a wrongful-death action. The defendant moved for a summary judgment, arguing that the granddaughter was disqualified from serving as the administratrix of the decedent's estate because the granddaughter was not an Alabama resident. Subsequently, the probate court revoked the letters granted to the granddaughter and granted letters of administration to another person. The circuit court entered a summary judgment in favor of the defendant, based in part on a finding that the granddaughter's appointment as administratrix was void as a matter of law, and holding that any amendment by the newly appointed personal representative could not relate back to the filing of the original complaint, which was a nullity. The new personal representative appealed.

In Holyfield, the Court discussed "void" and "voidable" acts with regard to letters of administration issued by the

1180795

probate court. The Court explained that where the fact of residence does not exist, the grant of letters of administration is not void but merely voidable and subject to revocation of those letters on direct attack. The decedent was a resident of Alabama, where the petition requesting the letters of administration was filed. Thus, the probate court had subject-matter jurisdiction over the decedent's estate. The Court stated that the order of the probate court was voidable and not void; thus, it followed that the acts of the granddaughter pursuant to that order were merely voidable. The Court found that under Rule 17(a), Ala. R. Civ. P., when an action is brought within the limitations period by someone other than the "real party in interest" and the real party in interest joins or ratifies the action after the limitations period has run, the amendment or ratification relates back to the time the action was originally filed, and the action need not be dismissed as time-barred. The Court held, therefore, that the trial court erred in entering a summary judgment and in not allowing the amendment substituting the name of the real party in interest, i.e., the newly appointed personal

1180795

representative, to relate back to the time the wrongful-death action was filed.

Ellis v Hilburn, 688 So. 2d 236 (Ala. 1997), allowed relation back of an amended complaint to an original complaint that was filed before the plaintiff became the personal representative of the her husband's estate. The plaintiff filed her original complaint as "next of kin," alleging that her husband died as a result of the defendant doctor's medical malpractice. Before the limitations period expired, the plaintiff was duly appointed by the probate court as her husband's personal representative. The defendant doctor filed a motion to dismiss the wrongful-death action on the ground of untimeliness, arguing that the original complaint failed to state a claim upon which relief could be granted because, he claimed, the face of the original pleadings showed that the action had not been properly filed within the two-year limitations period in the wrongful-death act. Specifically, he argued, the action was barred because the plaintiff had not sued as administratrix of the estate within two years of her husband's death. The circuit court denied the motion and allowed the plaintiff to amend her complaint to state that she

1180795

had been appointed personal representative within the limitations period. This Court affirmed the judgment, holding:

"The determinative issue in this case is whether a wrongful death complaint filed by one acting as 'next-of-kin' of the deceased, but who was not at the time the personal representative of the deceased's estate, can be amended after the expiration of the two-year wrongful death limitations period to name the plaintiff as the personal representative, where the 'next-of-kin' who filed the original complaint has in fact been appointed administratrix of the estate within the two-year limitations period.

"Dr. Ellis argues that Mrs. Hilburn did not file the action as the administratrix within two years of her husband's death, pointing out that the Wrongful Death Statute requires, as a substantive part of the cause of action, commencement of the action within two years of the death of the decedent. He relies on Downtown Nursing Home, Inc. v. Pool, 375 So. 2d 465 (Ala. 1979), cert. denied, 445 U.S. 930, 100 S.Ct. 1318, 63 L.Ed.2d 763 (1980). Dr. Ellis argues that, because the complaint filed in October 1994 was filed by Mrs. Hilburn as 'next-of-kin' and not as the administratrix, the complaint was a nullity and therefore could not be amended or corrected. Therefore, he argues, the amended complaint filed in January 1995 is also a nullity because, he contends, it has nothing to relate back to under Rule 15(c), Ala. R. Civ. P.

"In Pool this Court addressed similar issues of (1) whether one who is not an administrator of the estate may initially maintain a wrongful death action and (2) whether an amendment can relate back, when filed after the expiration of the two-year period, to substitute as the plaintiff the

administrator, who had been appointed administrator after the two-year period had expired. In Pool, J.P. filed a complaint based on the death of E.P., who had died on November 24, 1976. After the two-year period had expired, J.P. sought to amend his complaint to substitute as the plaintiff B.J., who had been appointed administrator of E.P.'s estate on February 5, 1979, more than two years after E.P.'s death. This Court held that because there had been no one authorized to file the action before the expiration of the two years, the doctrine of relation-back had no application.

"In Pool, the administrator was not appointed until after the limitations period had expired. In contrast, Mrs. Hilburn was appointed administratrix before the limitations period expired. Dr. Ellis, looking to Holyfield v. Moates, 565 So.2d 186 (Ala. 1990), argues that Mrs. Hilburn's suing as next-of-kin was void ab initio and therefore could not be ratified by her later being appointed administratrix. This Court stated in Holyfield, 565 So. 2d at 187-89:

"'In [Pool] and Brown v. Mounger [541 So. 2d 463 (Ala. 1989)], we held that to bring a wrongful death action pursuant to § 6-5-410 ... the personal representative must be a duly appointed executor or administrator, and that the failure of the personal representative to be so appointed rendered his acts void....

"'....

"'... That which is void provides no basis for corrective action. That which is merely voidable is viable until declared void and it will support both a waiver and an amendment.'

"However, Rule 17(a), Ala. R. Civ. P., suggests that so long as capacity exists before the limitations period expires, the wife, after being appointed administratrix within the limitations period, may then, as the real party in interest, ratify the commencement of the action. Thus, with respect to ratification, Rule 17(a) provides:

"'No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.'

"In Holyfield, supra, this Court distinguished between acts that are voidable and those that are void. It reversed the judgment of the trial court and remanded to allow an amendment, filed after expiration of the limitations period, to substitute the properly appointed personal representative as the real party in interest. The Court held that the amendment related back to the filing of the original complaint because the acts of the prior, improperly appointed personal representative, who as a nonresident of Alabama was disqualified, were not void, but merely voidable. The Court reasoned that the 'holding is mandated by Rule 17(a), Ala. R. Civ. P.' 565 So. 2d at 189. In reaching this conclusion, the Court looked to the reasoning of Hess v. Eddy, 689 F.2d 977 (11th Cir. 1982), and, upon reviewing the Hess court's interpretation of Rule 17, Fed.R.Civ.P., stated the following:

"'The plain language of the Rule clearly provides that when an action is brought by someone other than the real party in

interest within the limitations period and the real party in interest joins or ratifies the action after the limitations period has run, the amendment or ratification relates back to the time suit was originally filed and the action need not be dismissed as time barred."

"Holyfield, 565 So. 2d at 189 (emphasis in original). Earlier in the Holyfield opinion, this Court reviewed its decision in Pool and, relying on the Pool rationale, stated: 'If the two-year period prescribed by the statute has expired before the representative is "duly appointed," the heirs of the decedent are barred from recovery.' Holyfield, 565 So. 2d at 187. Because the two-year period did not expire before Mrs. Hilburn was 'duly appointed' as administratrix, she established her capacity within the limitations period and, thereby, ratified her claim. Holyfield; Rule 17(a). Her amendment, therefore, relates back to the date she filed her complaint.

"The motion to amend in this case is based upon Rule 17(a), not on Rule 15(c). Pool did not discuss ratification pursuant to Rule 17(a), and the holding in that case is based solely upon application of Rule 15(c) (dealing with relation back of amendments). This Court in Holyfield, however, recognized the distinction in its application of Rule 17(a). The rationale of that case supports a finding of a ratification of the filing of Mrs. Hilburn's action by her appointment within the limitations period. Thus, we conclude that her amendment related back pursuant to Rule 15(c)."¹

¹In Blue Star Ready Mix v. Cleveland, 473 So. 2d 497 (Ala. 1985), this Court acknowledged that it is unnecessary to apply Rule 15(c) in tandem with Rule 17(a) because the same result of relation back may be reached through Rule 17(a) without resorting to Rule 15(c).

1180795

Ellis v. Hilburn, 688 So. 2d at 238-39.

We recognize that our recent cases have held that the subsequent appointment of a personal representative did not relate back to the filing of the original complaint. Alvarado v. Kidd, 205 So. 3d 1188, involved a wrongful-death action where the relation-back doctrine did not permit the deceased patient's husband to relate his appointment as personal representative, which occurred after the two-year limitations period had expired, back to his filing of the original complaint.² In Northstar Anesthesia of Alabama, LLC v. Noble, 215 So. 3d 1044 (Ala. 2016), the wife was appointed personal representative of her deceased husband's estate. She concluded the estate's affairs and asked to be discharged, and the probate court granted her request. Before the limitations period expired, the wife filed a wrongful-death action against the medical providers who had treated her husband. After the limitations period had expired, she asked to be "reappointed" as representative, which the probate court permitted. The

²In his dissent in Alvarado, Justice Bryan recognized that, when a wrongful-death action is timely filed and letters of administration are later granted to the plaintiff within the limitations period, the plaintiff may use relation back under Rule 17(a). 205 So. 3d at 1205.

1180795

defendants filed motions for a summary judgment, which the trial court denied. On the defendants' permissive appeal, this Court reversed the denial, a plurality holding that (1) after being discharged and released from her appointment by the probate court, the representative had no authority to file a later wrongful-death action on behalf of the decedent's heirs and (2) the "reappointment" of the discharged personal representative after the limitations period expired did not relate back to the filing of the original wrongful-death complaint. See also Watson v. University of Alabama Health Servs. Found., P.C., 263 So. 3d 1030 (Ala. 2018) (holding that a legally appointed personal representative who has been discharged no longer has the capacity to bring a wrongful-death action).

Both Alvarado and Northstar involved the appointments of personal representatives after the limitations period had expired. The present case is more akin to Ellis, which involved the appointment of a personal representative before the limitations period expired.

Hill Crest argues that Ellis has been implicitly overruled by Ex parte Hubbard Properties, Inc., 205 So. 3d

1180795

1211 (Ala. 2016). In Hubbard Properties, the decedent died in an apartment fire on June 27, 2011. On June 11, 2013, the county administrator was appointed personal representative of the decedent's estate. On June 26, 2013, the decedent's wife filed a wrongful-death action against the owners of the apartment complex as the "attorney-in-fact" for the decedent. On January 23, 2014, the wife filed a motion to substitute the county administrator as the plaintiff, which the trial court granted. The owners of the apartment complex moved for a summary judgment, which the trial court denied. They then petitioned for a writ of mandamus, challenging the trial court's subject-matter jurisdiction. This Court held that the action filed by the wife was a nullity because the county administrator had been appointed personal representative of the decedent's estate 15 days before the wife filed the wrongful-death action. The wife's motion to substitute the county administrator as the plaintiff did not overcome the fatal error, i.e., that a personal representative had already been appointed when the wife filed the wrongful-death action purporting to represent the decedent's estate.

1180795

Hubbard Properties did not overrule Ellis because in Hubbard Properties there was a personal representative in place when the wife filed the wrongful-death action and her motion to substitute did not "cure" the fact that someone else was representing the decedent's estate, and had the sole power to initiate a proceeding, when the wife filed the wrongful-death action. In Ellis, the wife filed the wrongful-death action purporting to represent the decedent's estate and was, in fact, later appointed personal representative of the decedent's estate and substituted as the real party in interest before the limitations period expired. We recognize that the distinction may seem slight, but it is a distinction with a difference. That difference is the person with the legal capacity to file a wrongful-death action had been appointed in Hubbard Properties when the wife filed the wrongful-death action, whereas in Ellis the person who filed suit was subsequently given legal capacity to file suit before the limitations period expired.

Next, Hill Crest argues that the Ellis Court erred in relying on the theory of "relation back" in Rule 17(a), Ala.

1180795

R. Civ. P., and by failing to address or apply § 43-2-831, Ala. Code 1975. We disagree. Rule 17(a) provides:

"(a) Real party in interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

Rule 17(a) is a procedural rule allowing for the substitution of the real party in interest, which serves to protect the defendant against a subsequent action by the party actually entitled to relief and ensures that the judgment against the real party in interest will have proper res judicata effect. The second sentence in Rule 17(a), Ala. R. Civ. P., like Rule 17(a), Fed. R. Civ. P., lists persons who are the real party in interest.

"The second sentence of Rule 17(a) specifically enumerates seven persons who are real parties in interest. The purpose of the listing is to provide

1180795

guidance in cases in which it might not be clear who the real party in interest is and to emphasize the fact that the real party in interest might not be the person beneficially interested in the potential recovery. Of course, the language assumes that the applicable substantive law gives the persons named in the rule the right to sue. ..."

6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1543 (3d ed. 2010) (footnote omitted).

We recognize that this Court has held that the relation-back provision of § 43-2-831 does not apply to a wrongful-death action where the appointment of the decedent's spouse as personal representative of the estate occurred after the limitations period had expired. See Wood v. Wayman, 47 So. 3d 1212. Section 43-2-831 provides:

"The duties and powers of a personal representative commence upon appointment. The powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. Prior to appointment, a person named personal representative in a will may carry out written instructions of the decedent relating to the decedent's body, funeral, and burial arrangements. A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative."

(Emphasis added.)

1180795

The Court in Wood v. Wayman noted that a wrongful-death action is not filed for the benefit of the estate. Instead, the personal representative is the legislature's designee to act as a trustee to maintain the wrongful-death action, collect the damages, and distribute the proceeds pursuant to the statute of descent and distribution. The Wood Court reasoned that the relation-back provision of § 43-2-831 did not permit the widow to relate her appointment as personal representative, which occurred after the limitations period had expired, back to her original complaint because the proceeds from a wrongful-death action would not be "beneficial to the estate."

The Ellis Court correctly relied on Rule 17(a) to substitute the personal representative as the real party in interest before the limitations period expired and to allow the substitution to relate back to the filing of the original wrongful-death complaint.³ There was no need for the Ellis

³In Rowell v. Walker Baptist Medical Center, 290 F.R.D. 549 (N.D. Ala. 2012), the federal court held that where the county jail detainee's cousin filed a wrongful-death action and was subsequently appointed as personal representative before the limitations period expired and then filed an amended complaint, the amended complaint related back to the original complaint under Rule 17(a), Fed. R. Civ. P., and,

1180795

Court to address or rely on the relation-back provision of § 43-2-831 because a wrongful-death action does not benefit the estate. Cf. Ex parte Skelton, 275 So. 3d 144 (Ala. 2018) (applying relation back under both § 43-2-831 and Rule 17(a) to the personal representative's subsequent appointment where facilitating the distribution of interest on a testamentary trust to the decedent's estate would benefit the decedent's estate).

Conclusion

We reverse the summary judgment, and we remand the case for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Parker, C.J., and Wise, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.

Bolin, J., concurs specially.

Bryan, J., concurs in the result.

Shaw, J., dissents.

alternatively, under Rule 17(a), Ala. R. Civ. P.

1180795

BOLIN, Justice (concurring specially).

As a former probate judge, I write specifically to address the continued litigation arising out of this technical area of probate law, i.e., the mixture of wrongful-death actions, personal representatives, and statutes of creation. In an attempt to initially summarize how Alabama probate/civil tort law arrived at its current state, I note the following: There was no cause of action for wrongful death at common law. Section 6-5-410, Ala. Code 1975, is purely statutory, and this Court's role is to enforce the wrongful-death statute strictly as written and intended by the legislature. Golden Gate Nat'l Sr. Care, LLC v. Roser, 94 So. 3d 365, 369 (Ala. 2012) (Bolin, J., concurring specially). The legislature created a remedy for the wrongful death of a human being, the stated purpose being to deter homicide by the imposition of punitive damages; no benefits of this remedy would inure to the benefit of the decedent's estate but, rather, would be prosecuted by a trustee, whom the legislature determined to be the personal representative, for the benefit of the decedent's heirs at law; the statute creating this remedy imposes a two-year limitations period, which is part of the substantive elements

1180795

of a wrongful-death claim. To pursue a wrongful-death action, there must be, (1) within two years of the decedent's death, (2) a personal representative duly appointed by a probate court, with letters testamentary or letters of administration issued thereupon, and (3) the filing of a civil action alleging wrongful death.

All three critical elements set out above are present in the case at bar. Not embraced in the summary above is the dissimilar fact situation present in Ex parte Hubbard Properties, Inc., 205 So. 3d 1211 (Ala. 2016), as discussed in the main opinion. In Hubbard Properties, a valid personal representative was appointed and letters of administration granted by a probate court within two years of the decedent's death. That personal representative had the sole authority, bestowed by the statute (of creation), to file a timely action based on the alleged wrongful death of the decedent and, for whatever reason, did not do so. However, in the admittedly very limited circumstances of the present case, where the wrongful-death action is filed within the limitations period, and the appointment of the personal representative with the appropriate letters of authority is likewise granted within

1180795

the limitations period, there is no usurpation of an existent valid personal representative's sole power and authority to bring the action. It is this critical difference between Hubbard Properties and the instant case that allows the purpose in the relation-back provision of Rule 17(a), Ala. R. Civ. P., to apply. If Rule 17(a) did not apply under these facts, there would be no operative effect for Rule 17(a) with regard to a personal representative in a wrongful-death action.

1180795

SHAW, Justice (dissenting).

Our caselaw holds that the action filed in the instant case is a nullity. Specifically, a wrongful-death action must be filed by the personal representative of the decedent; when a complaint in such a case is filed by one who is not the personal representative, no action is actually commenced and no substitution of parties can occur, regardless of the timeliness of that substitution. Therefore, I must respectfully dissent.

"A personal representative may commence an action ... for the wrongful act, omission, or negligence of any person ... whereby the death of the testator or intestate was caused" Ala. Code 1975, § 6-5-410(a). This Code section requires a wrongful-death action to be filed by a personal representative--and no one else. See, e.g., Downtown Nursing Home, Inc. v. Pool, 375 So. 2d 465, 466 (Ala. 1979) ("Under [§ 6-5-410,] the cause of action is vested in the personal representative who acts as an agent of legislative appointment for the purpose of effectuating public policy. And this right is vested in the personal representative alone"). When a person who is not a personal representative files a

1180795

wrongful-death action, the result is a nullity. Watson v. University of Alabama Health Servs. Found., P.C., 263 So. 3d 1030, 1034 (Ala. 2018) (holding that a wrongful-death action filed by one after he had been discharged as personal representative was "a nullity"); Ex parte Bio-Medical Applications of Alabama, Inc., 216 So. 3d 420, 425 (Ala. 2016); Northstar Anesthesia of Alabama, LLC v. Noble, 215 So. 3d 1044, 1049 (Ala. 2016) (plurality opinion) (holding that one who was not a personal representative at the time she filed a wrongful-death complaint "was without authority ... to commence the wrongful-death action" and thus that the complaint "was a nullity");⁴ Ex parte Hubbard Props., Inc., 205 So. 3d 1211, 1213 (Ala. 2016) (same); Waters v. Hipp, 600 So. 2d 981, 982 (Ala. 1992) ("One who sues under [§ 6-5-410] without having been appointed executor or administrator does not qualify under this section as a personal representative,

⁴Although only four Justices joined the main opinion in Northstar, my writing concurring in the result in that opinion agrees with this point. See Northstar, 215 So. 3d at 1052 (Shaw, J., concurring in the result) ("The main opinion holds that the wrongful-death action ... is a nullity. I agree")

1180795

and the suit is a nullity."); Downtown Nursing Home, Inc. v. Pool, 375 So. 2d 465, 466 (Ala. 1979) (same).

"A 'nullity' is '[n]othing; no proceeding; an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no legal force or effect.' Black's Law Dictionary 1067 (6th ed. 1990)." Northstar, 215 So. 3d at 1051. Another definition for a "nullity" is "[s]omething that is legally void ... [t]he fact of being legally void." Black's Law Dictionary 1286 (11th ed. 2019). When a complaint is a nullity, another party cannot be substituted for the party who filed the action. Hubbard Properties, 205 So. 3d at 1213 ("[B]ecause [the plaintiff] did not have the requisite authority to pursue a wrongful-death action on behalf of [the decedent's] heirs, ... the action she filed is a legal nullity and a substitution of [the personal representative] as the plaintiff was not sufficient to overcome that fatal error.").⁵ In Ex parte Bio-Medical, Corey, the son of the decedent, filed a wrongful-

⁵Other doctrines, like relation back, also cannot be applied when the underlying action is a nullity. Northstar, 215 So. 3d at 1051; and Alvarado v. Estate of Kidd, 205 So. 3d at 1188 (refusing to apply the relation-back doctrine in a wrongful-death action filed by an improper party).

1180795

death action even though his brother, Darrick, was the properly appointed personal representative. After the action was filed, Corey moved the trial court under Rule 17(a), Ala. R. Civ. P., to substitute Darrick as the plaintiff, which the trial court granted. 216 So. 3d at 421-22. This Court, however, held that the action was a nullity and that such a substitution could not be made: "Because Corey lacked the authority to file the wrongful-death action, that action is a nullity Further, because the action is a nullity, Darrick could not be substituted as the plaintiff." 216 So. 3d at 423.

The timeliness of the attempts to substitute the personal representatives for the plaintiffs in Hubbard Properties and Bio-Medical was not a component of the analysis in either case. Issues regarding the timeliness of a wrongful-death action under Ala. Code 1975, § 6-5-410(d), are often found in conjunction with issues regarding whether the proper party filed the action. However, when an action is filed by a party who is not the personal representative, it is a nullity, regardless of timeliness. See Watson, 263 So. 3d at 1034 (holding a timely filed wrongful-death action to be a nullity

1180795

because it was filed by one who had been discharged as personal representative), and Waters, supra. Hubbard Properties and Bio-Medical are thus not distinguishable from the instant case on that point.

In Ellis v. Hilburn, 688 So. 2d 236, 239 (Ala. 1997), the wife of the decedent filed a wrongful-death action before being named personal representative of her husband's estate; she was later properly appointed as the personal representative. The defendant claimed that the action was a nullity. Without specifically addressing the fact that the case was a nullity, the Court held that the wife, after being appointed personal representative, established capacity, became the real party in interest, and could ratify her claim under Rule 17(a). 688 So. 2d 239. Ellis, however, does not explain how a nullity can be ratified.

In the instant case, Fannie M. Pollard was not the personal representative of the estate of Ed Young when she filed the complaint in this wrongful-death action. The result is that this action is a nullity. No action commenced; there was no proceeding; and the complaint was a "nothing"--without the legal force or effect to create an action in the trial

1180795

court. Any issue regarding Pollard's lack of capacity to file the complaint--and the ability to cure that defect--is irrelevant. See Northstar, 215 So. 3d at 1051 ("[T]he appellants were not under an obligation to raise the affirmative defense of capacity because the filing of [the] complaint was 'an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no legal force or effect.'" (quoting Black's Law Dictionary 1067 (6th ed. 1990))). Although Pollard was later made the personal representative, I see no authority indicating that this converts a null action into a viable case; Ellis avoided that issue. Thus, Pollard, in her new capacity as the personal representative, could not be substituted as the proper plaintiff or ratify her prior actions because there is no lawsuit in which she could do so in the first place. I thus respectfully dissent.